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LE APPLE BOUTIQUE HOTEL SDN BHD v. KEEN SOLUTION SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
VAZEER ALAM MYDIN MEERA JCA
M GUNALAN JCA
B AZIMAH OMAR JCA
[CIVIL APPEAL NOS: W-02(NCC)(A)-1004-06-2022
& W-02(NCC)(A)-1113-06-2022]
19 MAY 2023

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Abstract – *When a petitioner acts in total contradiction of its own interest within a company by filing a winding up petition, the corporate veil ought to be pierced to identify the alter egos at play. It would not be just and equitable to wind up a company if it is proven that the petitioner comes with unclean hands, especially when there is evidence that the petition is entirely devoid of merit and is an abuse of process.*

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COMPANY LAW: *Winding up – Petition – Appeal against – Whether entire petition genuine seek of legal redress or driven by mala fide intent – Whether petitioner came with clean hands – Whether corporate veil ought to be lifted – Whether company still had potential to earn and generate monies – Whether just and equitable to wind up company – Whether winding up petition devoid of merits*

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These appeals concerned a winding up petition which was allowed by the Judicial Commissioner ('JC') at the High Court on grounds of justice and equitability in view of an alleged lapsing of the company's purpose or business as well as the alleged breakdown of trust and confidence of the management. The appellants contested against the winding up of the company under the contention that the entire petition was not at all a genuine seek of legal redress, and was in actuality driven by *mala fide* intent to stifle the company's suit against the petitioner's inextricably related company. The petitioner and Le Apple Boutique Hotel Sdn Bhd ('LABHSB – the appellant in Appeal 1004') were co-shareholders of a company by the name of Le Apple Boutique Hotel (KLCC) Sdn Bhd ('LABHKLCC – the appellant in Appeal 1113'). LABHSB held majority shares of 55% while the petitioner held the minority shares of 45% in LABHKLCC. As set out in its memorandum and articles of association ('M&A'), LABHKLCC entered into a tenancy agreement with the petitioner's related company, PGCG Assets Holdings Sdn Bhd ('PGCG') for the purposes of development and operation of a hotel at a property ('demised property') on 18 October 2014 ('tenancy agreement'). The tenancy agreement became the core of a litigation between PGCG and LABHKLCC in a suit ('Suit 832'). In Suit 832, LABHKLCC

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sued PGCG for a total of RM19,644,322 being the capital expenditure LABHKLCC had expended towards the demised property. Out of this amount claimed, LABHKLCC was already successful in obtaining a summary judgment for the sum of RM1.65 million. The remainder disputations regarding the tenancy agreement was still a live issue in Suit 832 which was also slated to go on full trial. In less than ten days since the High Court in Suit 832 denied PGCG's ad-interim stay application, the petitioner suddenly came to PGCG's aid and acted in total contradiction of the petitioner's own interest within LABHKLCC by filing a winding up petition. In filing the winding up petition, the petitioner was willing to forego the opportunity to fight for almost RM20,000,000 in Suit 832 for the meagre complaints of an alleged lapsing of the company's purpose or business, and alleged breakdown of trust and confidence of the management. These two grounds were the petitioner's trump cards to convince the High Court that it was just and equitable to wind up LABHKLCC. The High Court, in allowing the petition, held that: (i) the petition was a *bona fide* petition and thus there was no necessity to pierce the corporate veil and identify the alter egos at play behind the petitioner and PGCG; (ii) there was an oral joint venture agreement entered into between LABHSB and the petitioner to operate a hotel ('impugned JV'); (iii) despite Suit 832 was still subjudice awaiting trial, the High Court identified that there was no statement by LABHSB on the alleged RM19.6 million spent by LABHSB for the development of the demised property into a hotel; (iv) it was just and equitable to wind up LABHKLCC as the company had ceased its sole purpose and business (under the impugned JV) of operating the LABHKLCC Hotel; and (v) it was just and equitable to wind up LABHKLCC as there was a breakdown of confidence and trust within the management as the petitioner was allegedly kept out of LABHKLCC's affairs, business and management. Hence, these appeals. The issues that arose for determination were whether the JC was right (i) in refusing to lift the corporate veil and finding that the petition was a *bona fide* petition without any ulterior motive ('issue (i)'); (ii) in deliberating on matters which were still live issues in Suit 832 (as the grounds to allow the petition ('issue (ii)'); and (iii) in making a finding of the existence of the impugned JV and the subsequent ceasing of business under the impugned JV and breakdown of management under the impugned JV ('issue (iii)').

Held (allowing appeals)
Per Azimah Omar JCA delivering the judgment of the court:

(1) The petitioner was a shareholder in LABHKLCC. As a shareholder, the petitioner definitely stood to gain some measure of financial gain anytime and every time that LABHKLCC stood to earn monies. Thus, the JC had erred in failing to identify the sheer oddity and bewilderment

of the petitioner's self-harming petition which indirectly would be beneficial to PGCG. There was an obvious *mala fide* ulterior motive which incentivised the petitioner's self-harming petition. And that *mala fide* concealed motive was simply that the petitioner and PGCG were each other's alter egos (or at least inextricably related companies'). There were a barrage of facts and documents which explicitly showed the link between the petitioner and PGCG: (i) the petitioner and PGCG shared identical business and registered addresses; (ii) the majority shareholder of the petitioner was also a director and shareholder of PGCG; (iii) the petitioner's majority shareholder was the wife of PGCG's director; and (iv) PGCG's parent company, PGCG Inc, explicitly confirmed in its filing to the Securities Exchange Commission of the United States ('SEC') that the group derived rental income from the petitioner. (paras 20-25)

(2) It would be in the petitioner's and PGCG's interest to keep LABHSB from gaining any shares in the monies the petitioner and PGCG collectively held as related companies. In the simplest sense, although the petitioner might gain from Suit 832 *vide* its 45% shareholding in LABHKLCC, in actuality the petitioner and PGCG (as a collective) would have to relinquish and lose 55% of their collective interest in the monies of LABHSB (due to LABHSB's shareholding in LABHKLCC). This was actually the real and actual *mala fide* ulterior motive incentivising the petitioner's 'self-harming' petition. If not for this *mala fide* design, there was simply no rhyme, reason or logic in the petitioner's self-harming petition. And even more revealing of the petitioner's unclean hands was the fact that the petitioner had deliberately concealed the fact that the petitioner had in another Industrial Court suit involving LABHKLCC appointed a solicitor, who was also acting for and was a director of PGCG Inc, to curiously defend LABHKLCC. The petitioner, by its own hands, had been trying to position PGCG's interest at the forefront and ahead of LABHKLCC's legal interest. Indeed, the JC had erred in failing to find that the petition was instead an abuse of process for the petitioner to achieve the collateral purpose of stifling LABHKLCC's suit against PGCG, the petitioner's related company. Therefore, issue (i) was answered in the negative. (paras 26-33)

(3) Suit 832's merits and facts should not have been deliberated by the JC especially considering evidence was not tendered into (or even needed to be tendered into) the winding up court to prove or disprove Suit 832. Suit 832 was only relevant for the High Court to examine the history of the parties' relationships to ultimately determine the true intent and purpose of the petition. At no point in time was it proper for the JC to even touch live issues on merit in Suit 832 which were still subjudice.

It was thus improper for the JC to decide the petition by making its own examination and conclusion as to the evidence and merits of the legitimacy of the LABHKLCC's claims against the petitioner in Suit 832. It was far too presumptuous and overreaching for the JC to determine the legitimacy of Suit 832 just so that the petition could be 'seen' to be genuine and *bona fide* not to stymie LABHKLCC's claim against PGCG. The JC's findings and deliberations as to the merits of the live issues in Suit 832 were hereby reversed. Issue (ii) was answered in the negative. (paras 34-38)

(4) It was plainly wrong for the JC to presume an 'oral JV agreement' when it was admitted by both parties that no written JV agreement was ever entered into. There was no cogent evidence to infer such an existence of an oral JV agreement. LABHKLCC's incorporation pre-dated the alleged oral JV agreement by two years. It could not then be said that the incorporation of LABHKLCC was borne out of the supposed oral JV agreement, as LABHKLCC was incorporated years before the supposed entry of the oral JV agreement. Considering the discrepancy above, the JC's finding of a JV agreement was wrong and too presumptuous. In the absence of any JV agreement or any shareholders' agreement between the petitioner and LABHSB, then the relationship between the two shall be that of co-shareholders who were bound by the company's M&A. (paras 40-44)

(5) The purpose and business of LABHKLCC could not be confined to the sole purpose of operating the hotel, and must necessarily be examined based on the clear stipulations of LABHKLCC's M&A. The JC had wrongly assumed that the purpose and business of LABHKLCC had ceased just because LABHKLCC technically no longer operated the hotel on the demised property. The fact that LABHKLCC was deeply engrossed in Suit 832 and successfully obtained summary judgment of RM1.65 million from PGCG clearly showed that LABHKLCC was still a going concern, and still had the potential to earn and generate monies. It would be unconscionable for the court to strictly assume that a company was 'not in business' when a company was embroiled in litigation. Just because commercial trade was stultified or stagnated due to litigation, could not automatically mean that the company was no longer in business. If that be the case, then an overwhelming majority of businesses in the world which are involved in litigation would be 'out of business.' (paras 45-47)

(6) Further, the JC erred in finding the petitioner was kept out of the business and affairs of LABHKLCC. The petitioner had considerable involvement and power in the affairs and management of LABHKLCC *ie*, the petitioner's director in LABHKLCC was still present and actively

voted in all of the decision-making process during the last and latest board of directors meeting. Thus, this court answered issue (iii) in the negative. The JC had erred in finding that it was just and equitable to wind up LABHKLCC. The petitioner's petition to wind up LABHKLCC was entirely devoid of merits. (paras 50-52)

Case(s) referred to:

Choong Eng Joo v. Live & Taste The Heritage Sdn Bhd [2021] MLJU 1568 ***(refd)***
Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals [2015] 1 CLJ 719 FC ***(refd)***
Ho Num Chon & Anor v. Tech-Lab Manufacturing Sdn Bhd [2017] 5 CLJ 187 HC ***(refd)***
Re Bellador Silk Ltd [1965] 1 All ER 667 ***(refd)***
Rinota Construction Sdn Bhd v. Mascon Rinota Sdn Bhd & Ors [2018] 2 CLJ 129 FC ***(refd)***
Tan Keen Keong v. Tan Eng Hong Paper & Stationery Sdn Bhd & Ors And Other Appeals [2021] 2 CLJ 318 FC ***(refd)***

Legislation referred to:

Companies Act 1965, Third Schedule

(Civil Appeal No: W-02(NCC)(A)-1004-06-2022)
For the appellant - Gavin Jayapal; M/s Gavin Jayapal
For the respondent - Gan Khong Aik & Gwee Xi Wen; M/s Gan & Partnership

(Civil Appeal No: W-02(NCC)(A)-1113-06-2022)
For the appellant - Edward Kuruvilla & Soh Lip Shan; M/s Kuruvila, Yeoh & Benjamin
For the respondent - Gan Khong Aik & Gwee Xi Wen; M/s Gan & Partnership

[Editor's note: For the High Court judgment, please see Keen Solution Sdn Bhd v. Le Apple Boutique Hotel (KLCC) Sdn Bhd & Anor [2022] 1 LNS 1339 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Azimah Omar JCA:

Factual Background Of The Appeal

[1] There are two appeals before us namely;

(i) Rayuan Sivil No: W-02(NCC)(A)-1004-06/2022 ("Appeal 1004"); and

(ii) Rayuan Sivil No: W-02(NCC)(A)-1113-06/2022 ("Appeal 1113").

[2] Both appeals concern a winding up petition which was allowed by the learned Judicial Commissioner (the learned JC) at the Kuala Lumpur High Court on the grounds of justice and equitability in view of an alleged lapsing of the company's purpose or business as well as the alleged breakdown of trust and confidence of management.

[3] On the other hand, the appellants (respondents in the petition proceedings below) contested against the winding up of the company under the contention that the entire petition was not at all a genuine seek of legal redress, and was in actuality driven by *mala fide* intent to stifle the company's suit against the petitioner's inextricably related company.

[4] The appellants also strenuously contend that the company is certainly a going concern and is still actively engaged in business in line with its businesses as enumerated within the company's memorandum and articles of association.

[5] The appellant in Appeal 1113 (Le Apple Boutique Hotel (KLCC) Sdn Bhd) is the company being petitioned to be wound up by the respondent. Whilst the appellant in Appeal No. 1004 (Le Apple Boutique Hotel Sdn Bhd) is one of the shareholders of the appellant 1113.

[6] For a better understanding of the matter at hand, it is necessary to set out the facts of the case that has led to the winding up petition. The parties will be referred to as they were at the High Court.

[7] The petitioner is Keen Solution Sdn Bhd ("the petitioner"). The petitioner and Le Apple Boutique Hotel Sdn Bhd ("LABHSB" – the appellant in Appeal 1004) are co-shareholders of a company by the name Le Apple Boutique Hotel (KLCC) Sdn Bhd ("LABHKLCC" – the appellant in Appeal 1113). LABHSB holds majority shares of 55% while the petitioner held the minority shares of 45% in LABHKLCC.

[8] As set out in its memorandum and articles of association ("M&A"), LABHKLCC has many businesses which include the business of hotel operations. LABHKLCC entered into a tenancy agreement with the petitioner's related company, PGCG Assets Holdings Sdn Bhd ("PGCG") for the purposes of development and operation of a hotel at No. 160 Jalan Ampang ("demised property") on 18 October 2014 ("tenancy agreement").

[9] The tenancy agreement became the core of a litigation between PGCG and LABHKLCC in Suit No WA-22NCVC-832-12/2020 ("Suit 832"). In Suit 832, LABHKLCC sued PGCG for a total of RM19,644,322 being the capital expenditure LABHKLCC had expended towards the demised property. Out of this amount claimed, LABHKLCC was already successful in obtaining a summary judgment on 21 June 2021 for the sum of RM1.65 million. The remainder disputations regarding the tenancy agreement is still a live issue in Suit 832 which is also slated to go on full trial. It must be strictly kept in mind that this specific disputation between LABHKLCC and PGCG is a live issue in Suit 832 and not at all an issue that should be addressed by the learned JC as well as this Court of Appeal.

[10] Nonetheless, apart and aside from the merits in Suit 832, the factum and existence of Suit 832 are certainly revealing of the true nature and the ulterior motive behind the petition. This will be demystified further along in this judgment.

[11] It is no mystery that Suit 832 would be immensely financially lucrative and advantageous to the best interest of the petitioner *via* its shareholding in LABHKLCC if it bears fruit. It would be in the utmost best interest of the petitioner to keep LABHKLCC as a going concern and to endeavour to see Suit 832 to its final conclusion. It is plain logic and basic commercial sense that a shareholder would want its company to emerge victorious and reap such a multimillion bounty the company may garner from the litigation.

[12] But what the petitioner instead did was at the very least baffling. In less than ten days since the High Court in Suit 832 denied PGCG's ad-interim stay application, the petitioner has suddenly come to PGCG's 'aid' and acted in total contradiction of the petitioner's own interest within LABHKLCC by filing the winding up petition on 3 September 2021.

[13] In filing the winding up petition, the petitioner is willing to 'forego' the opportunity to fight for almost RM20,000,000 in Suit 832 for the meagre complaints of an alleged lapsing of the company's purpose or business, and alleged breakdown of trust and confidence of management. These two meagre grounds (put against the likelihood of RM20,000,000 damages the petitioner may benefit from *via* LABHKLCC), were the petitioner's trump cards to convince the High Court that it was just and equitable to wind up LABHKLCC.

The High Court's Findings

[14] The learned JC allowed the impugned petition on the following grounds:

(i) the petition was a *bona fide* petition and thus, there was no necessity to pierce the corporate veil and identify the alter egos at play behind the petitioner and PGCG;

(ii) there was an oral joint venture agreement entered into between LABHSB and the petitioner to operate a hotel (being LABHKLCC) sometime in 2013 ("impugned JV");

(iii) despite Suit 832 is still subjudice awaiting trial, the learned JC identified that there was no statement by LABHSB on the alleged RM19.6 million spent by LABHSB for the development of the demised property into a hotel;

(iv) it was just and equitable to wind up LABHKLCC as the company has ceased its sole purpose and business (under the impugned JV) of operating the LABHKLCC Hotel; and

(v) it was just and equitable to wind up LABHKLCC as there was a breakdown of confidence and trust within the management as the petitioner was allegedly kept out of LABHKLCC's affairs, business and management.

The Appeals Before Us

[15] The appellant in Appeal 1113 had in its memorandums of appeal set out 36 grounds in appealing against the learned JC's decision. Whilst the appellant in Appeal 1004 had advanced eight grounds to challenge the learned JC's decision.

[16] Notwithstanding the fact that both the appellants had raised numerous grounds in challenging the learned JC's decision nonetheless, we are of the view that the grounds raised by both the appellants are basically similar.

[17] On our close perusal and thorough examination of the two memorandums of appeal, we opine that the propriety of the two appeals can be determined by condensing all those grounds stated in the two memorandums of appeal into three primary or major issues which can be summarised as follows:

(i) whether the learned JC was right in refusing to lift the corporate veil and finding that the petition was a *bona fide* petition without any ulterior motive;

(ii) whether the learned JC was right in deliberating on matters which were still live issues in Suit 832 (as his grounds to allow the petition); and

(iii) whether the learned JC was right in making a finding of the existence of the impugned JV and the subsequent ceasing of business under the impugned JV and breakdown of management under the impugned JV.

[18] We are of the view that apart from the protracted discussions regarding the existence or non-existence of the impugned JV it would be more revealing to examine the logic and pure motive behind the petition even before delving into the justiciability or equitability of the petition. This is simply for the fact that it is truly perplexing for the petitioner to act against its own financial interest in Suit 832 which it stood to gain *via* its 45% shareholding in LABHKLCC.

[19] We are thoroughly intrigued to discover the commercial and plain logic in the petitioner's petition before the conclusion and disposal of Suit 832. The examination of the 'true' purpose and objective of the petition is definitely more compelling than that of protracted deliberations on the existence or non-existence of the impugned JV.

Issue (i)

Whether The Learned JC Was Right In Refusing To Lift The Corporate Veil And Finding That The Petition Was A Bona Fide Petition Without Any Ulterior Motive

[20] It is unfortunate that the learned JC had failed to appreciate the sheer bafflement of the petitioner's self-harming petition which would indubitably lead to the petitioner's loss of almost RM20,000,000 in damages (if in case Suit 832 proved victorious). It was glaring that the petitioner was a shareholder in LABHKLCC. Thus, as a shareholder, the petitioner definitely stood to gain some measure of financial gain anytime and every time that LABHKLCC stood to earn monies. Thus, the learned JC had erred in failing to identify the sheer oddity and bewilderment of the petitioner's self-harming petition which indirectly would be beneficial to PGCG.

[21] If LABHKLCC was wound up, the petitioner (*vide* its shareholding in LABHKLCC would also sustain losses as LABHKLCC's Suit 832 would have been scuttled and stymied. In the meantime, PGCG would have been 'saved' from the potential liability of almost RM20 million that the High Court in Suit 832 might order against PGCG. The burning question is this – what was so compelling to the petitioner, that it would 'sacrifice' its own interest for the sake of 'saving' PGCG. The learned JC unfortunately did not see the necessity of unravelling this most perplexing act of 'selflessness'.

[22] Therefore, as was aptly contended by both the appellants, there was an obvious *mala fide* ulterior motive which incentivised the petitioner's self-harming petition. And that *mala fide* concealed motive is simply that the petitioner and PGCG are each other's alter egos (or at least inextricably related companies).

[23] It was obvious to see that the petitioner was willing to self-harm itself for the sake of PGCG **because any monies lost and paid by PGCG to LABHKLCC Would Have To Be Shared Between The Petitioner And LABHSB**. (Emphasis added). Thus, if PGCG were to lose Suit 832, the monies PGCG had to pay LABHKLCC would now no longer be held by PGCG and the petitioner (as related companies) but instead be diluted LABHSB's shares into the monies *via* LABHSB's majority shareholding in LABHKLCC.

[24] Thus, the petitioner and PGCG would unlawfully be able to refuse payment to LABHKLCC (as related companies) if LABHKLCC were unable to continue its pursuit of Suit 832. Thus, LABHSB and LABHKLCC would effectively and unlawfully be denied their day in court and likelihood to recover their monies.

[25] Now, this piercing of the corporate veil to reveal the petitioner's concealment is not one lifting without merits. There is a barrage of facts and documents which would explicitly show the link between the petitioner and PGCG:

(i) it is not mere coincidence that the petitioner and PGCG share identical business and registered addresses;

(ii) it is not mere coincidence that the majority shareholder of the petitioner (Chai Sook Tieng) is also a director and shareholder of PGCG;

(iii) it is not mere coincidence that the petitioner's majority shareholder is the wife of PGCG's director (Wong Weng Kung);

(iv) it is not mere coincidence that PGCG's parent company, PGCG Inc, explicitly confirmed it in its filing to the Securities Exchange Commission of the United States ("SEC") that the group derived rental income from the petitioner.

[26] The above considered, it is astoundingly plain to see that it would be in the petitioner's and PGCG's interest to keep LABHSB from gaining any shares in the monies the petitioner and PGCG collectively held as related companies. In the simplest sense, although the petitioner might gain from Suit 832 *vide* its 45% shareholding in LABHKLCC, in actuality the petitioner and PGCG (as a collective) would have to relinquish and lose 55% of their collective interest in the monies to LABHSB (due to LABHSB's shareholding in LABHKLCC). This was actually the real and actual *mala fide* ulterior motive incentivising the petitioner's 'self-harming' petition. If not for this *mala fide* design, there is simply no rhyme, reason, or logic in the petitioner's self-harming petition.

[27] And even more revealing of the petitioner's unclean hands was the fact that the petitioner (*via* its representative and deponent, Thum May Yin) had deliberately concealed the fact that the petitioner had in another Industrial Court Suit involving LABHKLCC appointed a solicitor (Mayley Gan Suat Lee – who is also acting for and is a director of PGCG Inc) to curiously defend LABHKLCC.

[28] It is certainly suspicious that the petitioner would seek legal counsel for the sake of LABHKLCC from a solicitor who is in direct conflict of interest with LABHKLCC (*albeit* for the other Industrial Court Suit). It is compelling to see that the petitioner, by its own hands, has been trying to position PGCG's interest at the forefront and ahead of LABHKLCC's legal interest. It is as though the petitioner is deliberately trying to put PGCG in the driver's seat of LABHKLCC's proverbial legal manoeuvring.

[29] Thus, we are in agreement with the appellants that indeed the learned JC has erred in failing to find that the petition was instead an abuse of process for the petitioner to achieve the collateral purpose of stifling LABHKLCC's suit against PGCG, (which is the petitioner's related company).

[30] The appellants referred to and this court draws wisdom from Nazlan JC's (now JCA) decision in *Ho Num Chon & Anor v. Tech-Lab Manufacturing Sdn Bhd* [2017] 5 CLJ 187; [2017] 9 MLJ 32:

> [45] Whilst the legal position has been made clear, it is thus of importance to now apply the same to the facts of the instant case. I have already stated that an unnecessary proceeding is an abuse of process. Absence of good faith is another. I must thus start by referring to the proposition that since this is not a striking out application on the basis of the petition not disclosing a reasonable cause of action but instead founded on an abuse of process, I am entitled to consider the history of litigation between the parties to ascertain whether there is an abuse of process.
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> [47] It seems obvious to me that this suggests that having failed to obtain an interlocutory injunction to restrain the respondent from convening the EGM to consider the proposed resolution to increase its share capital and to issue new shares, the petitioners now resorted to filing a winding up petition to achieve, for all intents and purposes, the same effect of the intended result.
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> [49] As such, in view of the pending winding up petition, the respondent could now not proceed with the proposed EGM to increase its share capital and to issue new shares, for such course of action could potentially be void under s. 223 without a validation order. Accordingly, in my judgment, there appears to be a collateral purpose for the filing of the winding up petition by the petitioners which is not entirely *bona fide* …

[31] We are also guided by Plowman J's decision in *Re Bellador Silk Ltd* [1965] 1 All ER 667 in which His Lordship has held the following: "A petition which is launched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose is, in my judgment, an abuse of the process of the court, and it is primarily on that ground that I would dismiss this petition."

[32] It is this abuse of process that becomes the improper purpose by which the petitioner is hiding behind the veil of incorporation. The Federal Court in the case of *Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals* [2015] 1 CLJ 719; [2015] 1 MLJ 773 has long upheld that the veil of incorporation ought to be lifted if the veil is abused for an improper purpose.

> [96] But in the event that we should, *we are of the view that it is now a settled law in Malaysia that the court would lift the corporate veil of a corporation if such corporation was set up for fraudulent purposes, or where it was established to avoid an existing obligation or even to prevent the abuse of a corporate legal personality*.
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> [97] As to what constitutes fraudulent purposes it has been described as to include actual fraud in equity. And fraud in equity occurred in *"…cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies …*
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> (emphasis added)

[33] Thereto, we answer issue (i) in the negative. The learned JC unfortunately had failed to appreciate all of the above in his decision to allow the petition. The petition should be reversed simply for this score. Nonetheless, for the sake of completeness, we shall address (*albeit* briefly) all remaining issues (although they are already essentially moot).

Issue (ii)

Whether The Learned JC Was Right In Deliberating On Matters Which Were Still Live Issues In Suit 832 (As His Grounds To Allow The Petition)

[34] It naturally flows from our answer to issue (i) that issue (ii) would be answered in the negative. Suit 832's merits and facts should not have been deliberated by the learned JC especially considering evidence is not tendered into (or even needed to be tendered into) the winding up court to prove or disprove Suit 832.

[35] Suit 832 is only relevant (not on its merits but by factual circumstances) for the High Court to examine the history of the parties' relationships to ultimately determine the true intent and purpose of the petition. But at no point in time was it proper for the learned JC to even touch live issues on merit in Suit 832 which are still subjudice.

[36] In the same way the petition ought not to be an abuse of process to stifle Suit 832, the learned JC should have not made any findings on the merits of live issues within Suit 832. Thus, it was improper for the learned JC to decide the petition by making his own examination and conclusion as to the evidence and merits of the legitimacy of the LABHKLCC's claims against the petitioner in Suit 832.

[37] The learned JC should have just stopped at identifying that LABHKLCC should still remain a going concern so as to not unjustly deprive LABHKLCC of its day in court (and not allow the petition to be abused as a tactical manoeuvre for PGCG to silence LABHKLCC *via* its related company, the petitioner). In brief, the merits of Suit 832 should not even have been an issue in determining the justiciability or equitability of the winding up petition. It is far too presumptuous and overreaching for the learned JC to determine the legitimacy of Suit 832 just so that the petition can be 'seen' to be genuine and *bona fide* not to stymie LABHKLCC's claim against PGCG.

[38] The learned JC's findings and deliberations as to the merits of the live issues in Suit 832 are hereby reversed.

Issue (iii)

Whether The Learned JC Was Right In Making A Finding Of The Existence Of The Impugned JV And The Subsequent Ceasing Of Business Under The Impugned JV And Breakdown Of Management Under The Impugned JV

[39] In actuality, this entire portion of the learned JC's determination is already moot as the petition from the outset is already improper and an abuse of process for the ulterior purpose of scuttling Suit 832. Nonetheless, just for the sake of completeness, we will briefly examine the correctness of the learned JC's findings on these issues.

[40] Firstly, it is plainly wrong for the learned JC to presume an 'oral JV agreement' when it was admitted by both parties that no written JV agreement was ever entered into. There was no cogent evidence to infer such an existence of an oral JV agreement. In fact, the timeline does not at all jive with the supposition of an oral JV agreement solely for the running and operation of a hotel.

[41] The learned counsel for the appellants aptly highlighted that LABHKLCC's incorporation (on 7 October 2011) pre-dates the alleged oral JV agreement by two years. It cannot then be said that the incorporation of LABHKLCC was borne out of the supposed oral JV agreement, as LABHKLCC was incorporated years before the supposed entry of the oral JV agreement. The supposed 'sole purpose under the JV agreement' could not have been the purpose of LABHKLCC's incorporation, since LABHKLCC was incorporated years before the impugned JV agreement was entered into.

[42] Considering the discrepancy above (as well as the absence of any other cogent evidence), we found that the learned JC's finding of a JV agreement was wrong and was too presumptuous. The learned JC has unfortunately erred in failing to consider relevant facts and evidence which disproves the entry of the impugned JV agreement, and instead considered baseless averments of the petitioner which ran contrary to the available evidence within the court. This is especially so considering the fact that LABHKLCC pre-existed the impugned JV agreement.

[43] We are aware that even in cases where a supposed oral JV agreement was allegedly entered prior to the incorporation of the alleged JV company, the Court of Appeal in *Choong Eng Joo v. Live & Taste The Heritage Sdn Bhd* [2021] MLJU 1568 was still cautious and not simply presume the existence of an oral JV agreement (unless there are cogent and probative evidence to corroborate such an existence):

> [27] Our assessment of the evidence and documents in the records of appeal in the present case will show otherwise. *We find the learned judge should not be too quick to reject the defendant's contention because the so-called joint*

venture or agreement prior to the incorporation of the Plaintiff's Company could also be for investment purposes as contended by the Defendant which is reflected in paragraph 3(a) of the Memorandum of Association which provides for matters related to investment (Investment Holding). The other purpose is to carry on business dealing in antiques in paragraph 3(c).

[28] The Plaintiff is alleging that there was joint venture or agreement that the Fish Lane Property was purchased under the name of the Defendant and two others for purpose of running it into hotel/homestay business as it part of joint venture or agreement. However, the Plaintiff admitted during trial that there was no agreement or terms of joint venture. It is oral joint venture or agreement. In our view, if it is an oral joint venture or agreement, the evidence by the Defendant that the purpose of purchase of Fish Lane Property is mainly for investment that too would be oral because there was no written joint venture or agreement. The Defendant is also alleged to be part of joint venture or agreement or involved in the joint venture or agreement, his defence and evidence that the purpose of joint venture or agreement and the purpose of purchase of property was for investment and not for hotel/homestay cannot be ruled out. Then, what was the actual joint venture or agreement or what was the real intention of the 8 individuals before the Company was incorporated. The learned judge only referred to paragraph 3 (b) of the Memorandum of Association stated in the Statement of Agreed Facts and concluded her finding and decided that the purpose of establishing the Plaintiff Company was to carry out businesses relating to hotels/ homestay therefore, the purchase of the property must be for businesses relating to hotels/homestay.

[29] In our view, the learned judge relying on Statement of Agreed Facts alone is not sufficient. The Statement of Agreed Facts may show paragraph 3(b) of the Memorandum of Association is an agreed fact *but once the Plaintiff's allegation is being disputed, the whole contents in the Memorandum of Association* must be referred to and considered. Based on the decision, in our opinion, the learned judge failed to refer and read the whole contents of the Memorandum of Association. If she has done so, she would have found that there is paragraph 3(a) of the Memorandum of Association showing the purpose of establishing the Plaintiff Company was for investment and the purchase of the property could also be for investment purpose as stated by the Defendant in his defence and evidence. The Defendant's position cannot be dismissed for lack of evidence. In our view, in the absence of clear intention of the joint venture or agreement whether the purchase of Fish Lane Property is for purpose of carrying hotel/homestay business or investment purpose, the learned judge must also look for some other evidence or documentary evidence which can support the Plaintiff's or the Defendant's claim. We agree that the issue is a critical one. It is the duty of the trial judge to evaluate all the evidence thoroughly and properly before making the correct decision. (emphasis added)

[44] Thus, in the absence of any JV agreement or any shareholders' agreement between the petitioner and LABHSB, then the relationship between the two shall be that of co-shareholders who are bound by the company's M&A. This is in line with the Federal Court's *dicta* in *Rinota Construction Sdn Bhd v. Mascon Rinota Sdn Bhd & Ors* [2018] 2 CLJ 129; [2018] MLJ 141:

> **[7] There was however no written 'Shareholders Agreement' or 'Joint Venture Agreement' entered into by the parties**. Accordingly, the relationship between the shareholders *inter se* and the operations of the company were **solely dictated by the company memorandum and articles of association**. (emphasis added)

[45] Thus, the purpose and business of LABHKLCC cannot be confined to the sole purpose of operating the hotel, and must necessarily be examined based on the clear stipulations of LABHKLCC's M&A. With that in mind, the learned JC has wrongly assumed that the purpose and business of LABHKLCC had ceased just because LABHKLCC technically no longer operated the hotel on the demised property.

[46] Secondly, the learned JC has misdirected himself in not appreciating the true nature and business of LABHKLCC as per the M&A. The learned JC had erroneously limited and skewed his perception to the notion that LABHKLCC was a "hotel operator" (and consequently held that the initiation of a civil suit cannot be deemed as a business of a hotel operator). As rightfully highlighted by the appellants' solicitors, LABHKLCC's M&A (which incorporated the Third Schedule of the Companies Act 1965) also stipulated that the conduct of seeking for an order which may indirectly or directly benefit the company's interest is also part and parcel of LABHKLCC's business. Perhaps a civil suit may not necessarily be an act of 'trade' but a civil suit certainly carries with it a clear business and commercial interests (including financial gains and losses).

[47] In any case, even if we were wrong that civil suit cannot at all be considered as a 'business' the fact that LABHKLCC is deeply engrossed in Suit 832 and successfully obtained a summary judgment of RM1.65 million from PGCG clearly shows that LABHKLCC is still a going concern, and still has the potential to earn generate monies. It would be unconscionable for the court to strictly assume that a company is 'not in business' when a company is embroiled in litigation (which is directly related to a company's interest in businesses which it undertook). Just because commercial trade is stultified or stagnated due to litigation cannot automatically mean that the company is no longer in business. If that be the case, then an overwhelming majority of businesses in the world which are involved in litigation would be 'out of business'.

[48] In any case, it must be reminded that a winding up petition is a drastic measure of last resort which should only be moved when all other avenues of recovery were already exhausted. We take heed of the eminent Federal Court's recent decision in *Tan Keen Keong v. Tan Eng Hong Paper & Stationery Sdn Bhd & Ors And Other Appeals* [2021] 2 CLJ 318; [2021] 3 MLJ 914:

> *[92] The just and equitable jurisdiction must be exercised carefully and judiciously, with special regard for the irreversible and drastic nature of a winding up as a court-ordered remedy (see Perennial (Capitol) Pte Ltd And Another v. Capitol Investment Holdings Pte Ltd And Other Appeals [2018] 1 SLR 763). Not only are there more moderate remedies available*, the purported wrongs under the Income Tax Act 1967 have been addressed and dealt with by the relevant authorities; and where they have not, to be dealt with by those charged with the necessary jurisdiction; or as far as the petitioner is concerned, for him, as a minority shareholder in both TEH Holdings and TEH Paper, to file an action under s. 181 of the Companies Act 1965 since the learned judge found that his real complaint was of oppression and that he actually wanted his shares bought out. (emphasis added)

[49] Similar to the present appeal, the petitioner hesitates nothing to directly pursue the petition amidst other available remedies. It was not in evidence that the petitioner had sought remedy in oppression to safeguard its interest as minority shareholder. If there was any authenticity in the petitioner's complaints, then the petitioner would have logically ensured that Suit 832 be fully determined, while pursuing a minority oppression action to safeguard its rights and interests as minority shareholder of LABHKLCC. But none of these measures were undertaken by the petitioner.

[50] Thirdly, we also find that the learned JC has erred in finding the petitioner was kept out of the business and affairs of LABHKLCC. It is thoroughly clear that the petitioner has considerable involvement and power in the affairs and management of LABHKLCC in light of the following facts:

(i) the petitioner's director in LABHKLCC cum deponent, Thum May Yin was still present and actively voted in all of the decision-making processes during the last and latest board of directors meeting on 7 December 2021;

(ii) the petitioner's Thum May Yin was also actively involved and was actively in control of LABHKLCC's legal positioning in the Industrial Court action. The petitioner had full-fledged access and control over LABHKLCC's documents and records in preparation of LABHKLCC's defence in the Industrial Court action. The petitioner's Thum May Yin had also testified before the Industrial Court in her capacity as director of LABHKLCC;

A (iii) not only that, the petitioner was in total control of LABHKLCC to the extent that the petitioner was free to conspicuously appoint Messrs Mayley Gan & Tai (a firm which has grave conflict of interest against LABHKLCC owing to their work and representation of PGCG).

B **[51]** All of the above considered, we answer issue (iii) also in the negative. The learned JC has erred in finding that it was just and equitable to wind up LABHKLCC.

This Court's Decision

[52] Thus, it is this court's decision that the petitioner's petition to wind C up LABHKLCC is entirely devoid of any merits. Thereto, we allow both Appeals 1004 and 1113. The winding up order (inclusive of the appointment of the liquidator) is hereby set aside with costs.

[53] This court also orders that the petitioner (Keen Solution Sdn Bhd) is liable to pay costs of RM40,000 to each of the appellants, subject to D allocatur.

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